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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1942.

No. **184**

HENRY A. KIESELBACH and OLGA M. KIESELBACH, *Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE THIRD CIRCUIT.**

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\_\_\_\_\_  
Henry A. Kieselbach and Olga M. Kieselbach pray that a writ of certiorari be issued to review the decision of the United States Circuit Court of Appeals for the Third Circuit, entered in the above cause on April 7, 1942, reversing in part the decision of the United States Board of Tax Appeals.

No review is asked of the part of the decision which affirmed the Board of Tax Appeals.

## **OPINION BELOW.**

The opinion of the Board of Tax Appeals is reported at 44 B. T. A. 279, and may be found in Appendix B. (R. 33-37) The opinion of the Circuit Court of Appeals is reported in 127 F. (2d) 359. (R. 42-50)

## **JURISDICTION.**

The decision of the Circuit Court of Appeals was entered on April 7, 1942. The jurisdiction of this court is invoked under Sec. 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

## **QUESTIONS PRESENTED.**

The petitioners on May 12, 1937, received \$73,246.57 under an award of "just compensation" for property taken by eminent domain by the City of New York. The award was computed by adding to the principal sum of \$58,000.00, the sum of \$15,246.57 representing "interest" made a part of the award by Sec. 976 of the Greater New York Charter, the statutory authority for the condemnation proceedings. The property condemned was acquired by one of the petitioners on April 2, 1927. The City took possession on January 3, 1933. (R. 28-31)

The Board of Tax Appeals held that (1) the condemnation was a "sale", the profit on which was taxable as capital gain, (2) the "interest" was part of the award and taxable as capital gain and (3) the petitioners "held" the property for more than ten years.

The Circuit Court of Appeals for the Third Circuit affirmed the Board of Tax Appeals on the question whether the condemnation was a sale and reversed the Board on the other two holdings. The questions are:

(1) Whether the part of the award of just compensation computed by the use of an interest factor is taxable as capital gain or as ordinary income.



(2) Whether the holding period for capital gain purposes extends to the date of payment, where possession is taken prior thereto.

### **STATUTES INVOLVED.**

The statutes involved are printed in Appendix A, *infra*, page 6.

### **STATEMENT.**

Henry A. Kieselbach inherited a parcel of property from his father on April 2, 1927. The City of New York, for the purpose of opening and extending certain streets, filed a proceeding in court late in 1930, asking for authority, *inter alia*, to condemn the building and improvements and a certain portion of the land owned by Mr. Kieselbach. The court on that same day entered an order granting the application and providing that the compensation should be determined by the court. (R. 29) The petitioner filed his formal claim for just compensation. On December 16, 1932 the Board of Estimate passed a resolution purporting to vest the title in fee to the real property in the City as of January 3, 1933. (R. 29) The City took possession on that date. (R. 34) The condemnation proceeding was tried between March 25, 1933 and February 19, 1935. The court entered its tentative decree on February 17, 1936, fixing tentative awards and assessments. The petitioner, on March 10, 1936, filed objections to the tentative decree. Hearings were held on the objections during March and April of 1936. The amount of the assessment against the petitioner was reduced upon consideration of his objections. The court entered a final decree on March 31, 1937, providing that the amount awarded to the owners of the properties was the "just compensation" to which they were entitled. Both the City and the petitioner had a right to appeal from this final decree within thirty days. No appeal was taken. (R. 30) The amount awarded to the petitioner was \$73,246.57 and that amount was paid to the petitioner on May



12, 1937. The total award was computed by adding to the principal amount of \$58,000, statutory "interest" thereon at 6 per cent from January 3, 1933, amounting to \$15,246.57. (R. 30-31) No deposit or other security to cover just compensation was made or provided by the City at any time prior to final payment. (R. 29)

The petitioners filed their income tax returns on the basis of cash receipts and disbursements. (R. 31)

### **SPECIFICATION OF ERRORS TO BE URGED.**

The Circuit Court of Appeals erred:

(1) In holding that the portion of the just compensation designated as "interest" was taxable as ordinary income, rather than as capital gain.

(2) In holding that the petitioners did not "hold" the property for more than ten years.

### **REASONS FOR GRANTING WRIT.**

(1) The decision of the Circuit Court of Appeals is in direct conflict with two decisions of the Circuit Court of Appeals for the Second Circuit on the identical question; *Seaside Improvement Co. v. Commissioner*, 105 F. (2d) 990, (C. C. A. 2; 1939); *Commissioner of Internal Revenue v. Appleby's Estate*, 123 F. (2d) 700, (C. C. A. 2; 1941). This direct conflict is recognized in the opinion. The Court said:

"The decisions from the Second Circuit cited above are in point. But the matter is *tabula rasa* in this Court. With great deference we believe the answer to be contrary to that reached by the Second Circuit."  
(R. 47)

This decision of the Third Circuit has not impressed the Board and it continues to follow the decisions from the Second Circuit. See *Brown v. Commissioner*, 47 B. T. A. No. 22, decided June 16, 1942.

(2) The decision of the Circuit Court of Appeals is in conflict with applicable decisions of this Court, holding that "interest" in a condemnation award is a part of the "just

compensation" to which the owner is entitled. *United States v. Klamath, etc. Indians*, 304 U. S. 119 [1938]; *Shoshone Tribe of Indians v. United States*, 299 U. S. 476, 496 [1937]; *Phelps v. United States*, 274 U. S. 341 [1927]; *Seaboard Airline Ry. Co. v. United States*, 261 U. S. 299 [1923].

(3) The decision of the Circuit Court of Appeals is in conflict with applicable decisions of the other Circuit Courts of Appeal and the Court of Claims. *Holley v. United States*, 124 F. (2d) 909, (C. C. A. 6, 1942); *United States Trust Co. of New York v. Anderson*, 65 F. (2d) 575 (C. C. A. 2, 1933) cert. denied, 290 U. S. 683; *Posselius v. United States*, 31 F. Supp. 161 (Ct. Cl. 1940); *Williams Land Co. v. United States*, 31 F. Supp. 154 (Ct. Cl. 1940); *Helvering v. Drier*, 79 F. (2d) 501 (C. C. A. 4, 1935); *Commissioner of Internal Revenue v. Speyer*, 77 F. (2d) 824 (C. C. A. 2, 1935; cert. denied, 298 U. S. 631; *Drier v. Helvering*, 72 F. (2d) 76 (C. C. A., D. C. 1934).

(4) The decision of the Circuit Court of Appeals on the question of the period the property was held is one of first impression and is in conflict with applicable decisions of this Court. *Garrison v. City of New York*, 88 U. S. 196; *A. F. & G. Realty Corp. v. City of New York*, 313 U. S. 540.

Wherefore it is respectfully submitted that this petition for writ of certiorari should be granted:

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## APPENDIX A

Revenue Act of 1936, c. 690, 49 Stat. 1648.

**SEC. 22. GROSS INCOME.**

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. In the case of Presidents of the United States and judges of courts of the United States taking office after June 6, 1932, the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such Presidents and judges are hereby amended accordingly.

**SEC. 117. CAPITAL GAINS AND LOSSES.**

(a) *General Rule.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:

100 per centum if the capital asset has been held for not more than 1 year;

80 per centum if the capital asset has been held for more than 1 year but not for more than 2 years;

60 per centum if the capital asset has been held for more than 2 years but not for more than 5 years;

40 per centum if the capital asset has been held for more than 5 years but not for more than 10 years;

30 per centum if the capital asset has been held for more than 10 years.

(b) *Definition of Capital Assets.*—For the purposes of this title, "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer

if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

(c) *Determination of Period for which Held.*—For the purpose of subsection (a)—

(1) In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 113, the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged.

(2) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

(3) In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain was recognized to the distributee under the provisions of section 112 (g) of the Revenue Act of 1928 or the Revenue Act of 1932, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution.

(4) In determining the period for which the taxpayer has held stock or securities the acquisition of which (or the contract or option to acquire which) resulted in the nondeductibility (under section 118 of this Act or section 118 of the Revenue Act of 1928 or the Revenue Act of 1932 or the Revenue Act of 1934, relating to wash sales) of the loss from the sale or other disposition of substantially identical stock or securities, there shall be included the period for which he held the stock or securities the loss from the sale or other disposition of which was not deductible.